

**Iowa Department of Natural Resources  
Environmental Protection Commission**

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**ITEM**

**13**

**DECISION**

**TOPIC**      **Final Rule** – Chapter 23 – Air Quality Program Rules – Rescission of vacated NESHAP

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The Department is requesting that the Commission adopt amendments to Chapter 23 "Emission Standards for Contaminants" of the 567 Iowa Administrative Code.

The purpose of the rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT) and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

Notice of Intended Action was published in the Iowa Administrative Bulletin (IAB) on December 3, 2008, as ARC 7395B. A public hearing was held on January 5, 2009. The Department did not receive any comments at the public hearing. The Department received two written comments before the public comment period closed on January 6, 2009.

The public comments submitted are described briefly in the rulemaking preamble for the respective items. Additionally, a public participation responsiveness summary is attached to this agenda item. In response to comments, the Department made minor changes to the adopted rules from what was published in the Notice.

Over the last year and a half, the D.C. Court has issued rulings on several significant federal programs promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air agencies.

In response to these vacatur, the Department is removing the now vacated federal regulations that were adopted by reference. The specific rule amendments are explained in the preamble of the attached Notice. A summary of the vacated federal regulations, the D.C. Court decisions, and the impacts of the vacatur on the Department and on stakeholders is included below and in the rulemaking preamble.

### MACT Regulations

Section 112 of the Clean Air Act (CAA), as amended in 1990, requires EPA to develop a list of source categories or subcategories that emit, or have the potential to emit, Hazardous Air Pollutants (HAP), and to issue regulations for these source categories or subcategories. Section 112 also requires certain subject sources to meet Maximum Achievable Control Technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the National Emissions Standards for Hazardous Air Pollutants (NESHAP) program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT are adopted by reference into the state air quality rules.

### CAA Sections 112(g) and 112(j)

Section 112 of the CAA includes provisions to require MACT for major sources of HAP emissions in the event that EPA does not issue MACT standards. Under section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the unit will meet standards equivalent to MACT. Under section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both 112(g) and 112(j) in Iowa.

### MACT Vacatures

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf>

The D.C. Court issued its decision to vacate the Boiler MACT on June 8, 2007, and issued the mandate making the decision final and effective on July 30, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available on-line at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf>

Because of the D.C. Court vacatures, it now appears that sections 112(g) and 112(j) apply to sources affected by the vacated Boiler and Brick MACTs. Additionally, EPA entered into a D.C. Court ordered agreement that includes several options, including a schedule requiring EPA to repropose a Boiler MACT by July 31, 2009, and to repromulgate a final Boiler MACT standard by July 31, 2010. EPA has not provided a schedule for re-promulgating the Brick MACT.

#### Recent Department Activities

At the Department's Air Quality Client Contact meetings on August 14, 2008, and November 13, 2008, the Department discussed the implications of the Boiler MACT vacatur with stakeholders. At the meetings, the Department outlined a tentative, section 112(j) timeline for owners and operators of facilities with boilers and process heaters. The Department sent follow-up letters to affected facilities on September 16, 2008, and on December 31, 2008.

If the Commission approves the final rules, the final rules will be published in the Iowa Administrative Code on March 11, 2009, and will become effective on April 15, 2009.

An administrative rule fiscal impact statement and a public participation responsiveness summary are attached.

Christine Paulson  
Environmental Specialist Senior  
Program Development Section, Air Quality Bureau  
Memo date: January 26, 2009

## ENVIRONMENTAL PROTECTION COMMISSION [567]

### Adopted and Filed

Pursuant to the authority of Iowa Code section 455B.133, the Environmental Protection Commission hereby amends Chapter 23, “Emission Standards for Contaminants,” Iowa Administrative Code.

The purpose of the rule making is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are addressed in this rule making are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for industrial, commercial and institutional boilers and process heaters and the NESHAP for brick and structural clay products manufacturing.

Notice of Intended Action was published in the Iowa Administrative Bulletin (IAB) on December 3, 2008, as **ARC 7395B**. A public hearing was held on January 5, 2009. The Department did not receive any oral or written comments at the public hearing. The Department received two sets of written comments before the public comment period closed on January 6, 2009.

The public comments submitted are described below for the respective items. Additionally, the submitted comments and the Department’s response to those comments are summarized in more detail in a responsiveness summary available from the Department. In response to comments, the Department made minor changes to the adopted rules from what was published in the Notice.

Over the last year and a half, the D.C. Court has issued rulings on several significant

federal regulations promulgated by the U.S. Environmental Protection Agency (EPA). The D.C. Court found the regulations to be unauthorized under the federal Clean Air Act (CAA) or otherwise deficient. Although the D.C. Court vacated the federal regulations, the regulations were adopted by reference and therefore are still in effect and enforceable by the Department. The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries and for state and local air quality agencies. In response to these vacatur, the Department is removing the now vacated federal regulations that were adopted by reference.

Section 112 of the CAA as amended in 1990 requires EPA to develop a list of source categories or subcategories that emit or have the potential to emit hazardous air pollutants (HAP) and further requires EPA to issue regulations for these source categories or subcategories. Section 112 also requires certain subject sources to meet maximum achievable control technology (MACT) for controlling HAP.

EPA issues the MACT standards for listed source categories and subcategories under the NESHAP program. EPA promulgated the NESHAP with MACT standards for brick and structural clay products manufacturing (Brick MACT) on May 16, 2003. EPA promulgated the NESHAP with MACT standards for institutional, commercial and industrial boilers and process heaters (Boiler MACT) on September 13, 2004. The Brick MACT and the Boiler MACT are currently adopted by reference into the existing state air quality rules.

Section 112 includes provisions to require MACT for major sources of HAP emissions in the event that EPA does not issue MACT standards. Under Section 112(g), if EPA has not set applicable emission limits for a category of listed HAP sources, construction of a new major source or modification of an existing major source in the source category may not occur unless the Administrator (or delegated state or local agency) determines on a case-by-case basis that the

unit will meet standards equivalent to MACT. Under Section 112(j), if EPA fails to promulgate a standard for a listed category or subcategory by the dates established in the CAA, states must conduct a case-by-case MACT determination for each subject source category or subcategory and include the MACT requirements in each facility's Title V Permit. EPA has delegated authority to the Department to implement and enforce both Sections 112(g) and 112(j) in Iowa.

The D.C. Court issued its decision to vacate the Brick MACT on March 13, 2007, and issued the mandate making the decision final and effective on June 18, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available online at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200703/03-1202a.pdf>.

The D.C. Court issued its decision to vacate the Boiler MACT on June 8, 2007, and issued the mandate making the decision final and effective on July 30, 2007. EPA did not appeal the decision to the U.S. Supreme Court. The D.C. Court's decision is available online at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200706/04-1385a.pdf>.

Because of the D.C. Court vacatur, it now appears that Sections 112(g) and 112(j) apply to sources affected by the vacated Boiler and Brick MACTs. Additionally, EPA entered into a D.C. Court ordered agreement that includes several options, including a schedule requiring EPA to repropose a Boiler MACT by July 31, 2009, and to repromulgate a final Boiler MACT standard by July 31, 2010. EPA has not provided a schedule for re-promulgating the Brick MACT.

At the Department's Air Quality Client Contact meetings on August 14, 2008, and November 13, 2008, the Department discussed the implications of the Boiler MACT vacatur with stakeholders. At the meetings, the Department outlined a tentative, Section 112(j) time line for owners and operators of facilities with boilers and process heaters. The Department sent

follow-up letters to affected facilities on September 16, 2008, and on December 31, 2008.

Since only three brick and structural clay products manufacturing facilities exist in the state, the Department will be working with these facilities individually to develop the Section 112(j) requirements as needed.

Item 1 amends paragraph 23.1(4)“dd,” which adopts by reference the federal provisions for the Boiler MACT. The amendment removes most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Boiler MACT. The amendment also includes a paragraph explaining the vacatur and indicating that the adoption by reference of federal regulations under 40 CFR Part 63, Subpart DDDDD, is rescinded. The Department received comments from EPA Region VII on this item, suggesting that the Department clarify the amendment to state that the adoption by reference of the federal regulations is rescinded rather than stating that the federal regulations are no longer adopted by reference. The Department is making the suggested changes to the adopted amendments. The paragraph is being preserved as a placeholder because EPA is required to repromulgate the Boiler MACT and may do so under the same federal subpart.

Item 2 amends paragraph 23.1(4)“dj,” which adopts by reference the federal provisions for the Brick MACT. The amendment removes most of the explanatory text from the paragraph. The change is being made because the D.C. Court vacated the Brick MACT. The amendment also includes a paragraph explaining the vacatur and indicating that the adoption by reference of federal regulations under 40 CFR Part 63, Subpart JJJJJ, is rescinded. The Department received comments from EPA Region VII on this item, suggesting that the Department clarify the amendment to state that the adoption by reference of the federal regulations is rescinded rather than stating that the federal regulations are no longer adopted by reference. The Department is

making the suggested changes to the adopted amendments. The paragraph is being preserved as a placeholder because EPA is required to repromulgate the Brick MACT and may do so under the same federal subpart.

These amendments are intended to implement Iowa Code section 455B.133.

The following amendments are adopted.

These amendments will become effective on April 15, 2009.

**ITEM 1.** Amend paragraph **23.1(4)“dd”** as follows:

dd. Emission standards for industrial, commercial and institutional boilers and process heaters. These standards apply to new and existing major sources with industrial, commercial or institutional boilers and process heaters. ~~For purposes of these standards, a boiler is defined as an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water. Waste heat boilers, as defined in the federal rule, are excluded from these standards. For purposes of these standards, a process heater is defined as an enclosed device using controlled flame, that is not a boiler, and the unit's primary purpose is to transfer heat indirectly to a process material (liquid, gas, or solid) or to a heat transfer material for use in a process unit, instead of generating steam. Process heaters are devices in which the combustion gases do not directly come into contact with process materials. Process heaters do not include units used for comfort or space heat, food preparation for on-site consumption, or autoclaves. (Part 63, Subpart DDDDD)\*~~

\*As of April 15, 2009, the adoption by reference of Part 63, Subpart DDDDD, is rescinded. On July 30, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart DDDDD, in its entirety, and



requiring EPA to repromulgate final standards for industrial, commercial or institutional boilers and process heaters at new and existing major sources.

**ITEM 2.** Amend paragraph **23.1(4)“dj”** as follows:

dj. Emission standards for hazardous air pollutants for brick and structural clay products manufacturing. These standards apply to new and existing brick and structural clay products manufacturing facilities that are, are located at, or are part of a major source of hazardous air pollutant emissions. ~~The brick and structural clay products manufacturing source category includes those facilities that manufacture brick including, but not limited to, face brick, structural brick, and brick pavers; clay pipe; roof tile; extruded floor and wall tile; or other extruded, dimensional clay products. Additional applicability criteria and exemptions from these standards are contained in the applicable subpart. (Part 63, Subpart JJJJ)\*~~

\*As of April 15, 2009, the adoption by reference of Part 63, Subpart JJJJ, is rescinded. On June 18, 2007, the United States Court of Appeals for the District of Columbia Circuit issued its mandate vacating 40 CFR Part 63, Subpart JJJJ, in its entirety, and requiring EPA to repromulgate final standards for brick and structural clay products manufacturing at new and existing major sources.

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Date

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Richard A. Leopold, Director

## Administrative Rule Fiscal Impact Statement

Date: October 20, 2008

**Agency:** Department of Natural Resources

**IAC Citation:** 567 IAC. 23.1(4)"dd" and 23.1(4)"dj"

**Agency Contact:** Christine Paulson

**Summary of the Rule:** The purpose of the rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT) and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

*Fill in this box if the impact meets these criteria:*

☒ No Fiscal Impact to the State.

☐ Fiscal Impact of less than \$100,000 annually or \$500,000 over 5 years.

☐ Fiscal Impact cannot be determined.

Brief Explanation:

Rule changes will not affect expenditures or revenues to the state.

*Fill in the form below if the impact does not fit the criteria above:*

☐ Fiscal Impact of \$100,000 annually or \$500,000 over 5 years.

\* Fill in the rest of the Fiscal Impact Statement form.

**Assumptions:**

*Describe how estimates were derived:*

***Estimated Impact to the State by Fiscal Year***

	<u>Year 1 (FY     )</u>	<u>Year 2 (FY     )</u>
<b>Revenue by Each Source:</b>		
GENERAL FUND		
FEDERAL FUNDS		
Other (specify)		
<b><i>TOTAL REVENUE</i></b>	_____	_____
<b>Expenditures:</b>		
GENERAL FUND		
FEDERAL FUNDS		
Other (specify)		
<b><i>TOTAL EXPENDITURES</i></b>	_____	_____
<b><i>NET IMPACT</i></b>		

  X   This rule is required by State law or Federal mandate.

*Please identify the state or federal law:*

Clean Air Act sections 112, as codified in 40 Code of Federal Regulations, Part 63.

       Funding has been provided for the rule change.

*Please identify the amount provided and the funding source:*

  X   Funding has not been provided for the rule.

*Please explain how the agency will pay for the rule change:*

The agency will not need additional revenue to implement this rule.

***Fiscal impact to persons affected by the rule:***

The vacatur of these federal programs have elicited uncertainty and confusion for regulated industries. Since the now-vacated federal regulations were adopted by reference into state rules, the affected facilities needed to apply for variances from recordkeeping and reporting provisions contained in the federal regulations that were adopted by reference. Removing the federal regulations that were adopted by reference will be a benefit to industries and other facilities affected by the Boiler MACT and Brick MACT because they will no longer need to apply for variances. The Department is working directly with affected facilities on what future state or federal rules may require.

***Fiscal impact to Counties or other Local Governments (required by Iowa Code 25B.6):***

A few municipal utilities were impacted by the now-vacated Boiler MACT. As noted above, removing the federal regulations that were adopted by reference will be a benefit to these facilities because they will no longer need to apply for variances. The Department is working directly with affected facilities on what future state or federal rules may require.

\* If additional explanation is needed, please attach extra pages.

Agency Representative preparing estimate: Christine Paulson  
Telephone Number: 515 242-5154

**PUBLIC PARTICIPATION RESPONSIVENESS SUMMARY  
FOR  
567 IOWA ADMINISTRATIVE CODE  
CHAPTER 23 EMISSION STANDARDS FOR CONTAMINANTS**

**Introduction**

The purpose of the rule changes is to remove from the state air quality rules certain federal regulations that the United States Court of Appeals for the District of Columbia Circuit (the D.C. Court) recently vacated. The federal programs vacated by the D.C. Court that are being addressed in this rulemaking are the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Boilers and Process Heaters (the Boiler MACT) and the NESHAP for Brick and Structural Clay Products Manufacturing (Brick-Clay MACT).

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**Public Comment:**

A summary of written comments submitted by Gina Grier, Air Planning and Development Branch, EPA Region VII:

EPA offered some alternative language that EPA believes better characterizes the Department's actions in the amendments. Rather than stating that the vacated federal regulations are "not adopted by reference," EPA suggests instead indicating that adoption by reference of the federal regulations is "rescinded."

**Department Response:**

The Department agrees that EPA's suggested language better characterizes the intent of the amendments.

**Recommended Actions**

The Department is making the suggested changes in the final amendments.

**Public Comment:**

A summary of written comments submitted by Jon Kallen, MidAmerican Energy Company:

MidAmerican supports the Department's rule making to remove the vacated federal regulations from the state's administrative rules and does not recommend any changes to the amendments proposed in the Notice.

MidAmerican made additional recommendations for how the Department should proceed regarding 112(j) and case-by-case MACT activities, and what types of information the Department should consider if implementing case-by-case MACT becomes necessary.

**Department Response:**

The Department agrees with the commenter's recommendations to proceed with final rules to remove the vacated federal NESHAP from the state administrative rules. The additional comments regarding procedures for implementing 112(j) and case-by-case MACT are beyond the scope of this rulemaking and are not addressed in this responsiveness summary. However, the Department has addressed these issues in a response letter sent to the Association of Business and Industry (ABI) on December 18, 2008, and in letters sent to facilities on December 31, 2008, including letters sent to MidAmerican Energy Company facilities, affected by the Boiler MACT vacatur and 112(j).

**Recommended Actions**

No action recommended.